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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

DONG AH TIRE & RUBBER CO., LTD,

Plaintiff,

v.

GLASFORMS, INC.,

Defendant/Third-Party
Plaintiff.

v.

CTG INTERNATIONAL (NORTH AMERICA)
INC., and TAISHAN FIBERGLASS, INC.,

Third-Party Defendants.

Case Number C 06-3359 JF (RS)

ORDER¹ RE MOTIONS IN LIMINE

RE: Docket Nos. 251, 284, 286 & 288

On June 23, 2009, the Court issued an order disposing of eleven motions in limine. Four motions in limine currently are pending. Subject to any necessary revision at trial, the Court now disposes of the remaining motions in limine as follows:

¹ This disposition is not designated for publication in the official reports.

A. Defendants' motion to exclude hearsay evidence

To prove that it suffered damages as a result of failures caused by Defendants' fiberglass, Glasforms intends to introduce certain of its written product records, known as Customer Complaint & Credit Memo Forms ("CAP-3 Forms"). These records themselves incorporate accounts of electrical failures sent to Glasforms by its customers—who used Glasforms' insulator rods to produce finished insulators—and the customers of its customers—end-users, such as utilities, that used the finished rods.² Glasforms will rely on the records to prove the details of various failures, including the date and time of failure, the surrounding circumstances, and any notable features of the failure itself. While Glasforms does intend to call as witnesses several employees of customers Tyco, K-Line, and Dong Ah, it does not intend to call employees of any of its other customers, or of their customers.

Defendants argue that with the exception of records that (1) were created by Glasforms or its testifying customers and (2) pertain to failures of which those parties or their agents had first-hand knowledge, the records are inadmissible hearsay. Glasforms argues that the records may be admitted under the business records exception to the hearsay rule. *See* Fed. R. Evid. 803(6). The exception applies to records created at or near the time of an event or fact, by or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if such record-keeping was the regular practice of the business. In addition, records created by third parties and incorporated into a business's regularly kept records may be admissible if the incorporating business relied on the records and the records have other indicia of trustworthiness. Glasforms also argues that the records are admissible under Rule 807, which creates an exception to the hearsay rule for records that do not meet the requirements of Rule 803(6) but have other guarantees of reliability.

Defendants make several arguments as to why neither Rule 803(6) nor Rule 807 should apply. First, they argue that the foundational requirements of Rule 803(6) have not been met at any of the multiple layers of hearsay that are present in Glasforms' proposed evidence. Second,

² In many cases, the accounts of failures provided by end-users were provided first to Glasforms' customers, who in turn transmitted the accounts to Glasforms.

they argue that even if Glasforms *theoretically* could rely on incorporated third-party documents that themselves lack a business-records foundation, Glasforms cannot make the requisite factual showing. Finally, Defendants argue that Rule 807 does not apply because the “extraordinary circumstances” required to trigger its application are absent. The Court addresses these arguments in turn.

1. Foundational requirements of Rule 803(6)

a. Contemporaneous recording

Defendants argue that the chain of records offered by Glasforms—from Glasforms itself to the customers of its customers—contains numerous instances of insufficiently contemporaneous record-keeping. The largest time gap identified by Defendants is seven weeks. For example, Defendants note that a Glasforms customer apparently learned of a rod failure on October 19, 2007, but did not send Glasforms an email containing the particulars of the failure until November 16, 2007, and that Glasforms in turn did not place the substance of the email into its own complaint form until December 5, 2007.

As a general matter, the business records exception is construed generously in favor of admissibility. *Conoco, Inc. v. Dep’t of Energy*, 99 F.3d 387, 391 (Fed. Cir. 1997). Moreover, Rule 803(6) requires that a record be “made at *or near* the time” of the recorded event—a flexible requirement merely intended to prevent inaccuracy, such as by lapse of memory. *See* McCormick, Evidence § 289 at 258 (5th ed. 1999). Thus, in determining whether a record is sufficiently contemporaneous, a court may—and indeed “must[–]take[] [account] of practical considerations,” and must not apply the rule “with any technical [rigidity],” as by reference to “arbitrary or artificial time limits . . . measured by hours or days or even weeks.” *Missouri Pac. R. Co. v. Austin*, 292 F.2d 415, 422-23 (5th Cir. 1961). The timeliness requirement therefore will have been satisfied if a record was made within “a reasonable time” of the relevant event or fact. *Seattle-First Nat. Bank v. Randall*, 532 F.2d 1291, 1296 (9th Cir. 1976).

In the instant case, the fact that on certain occasions it took some interval of time for the end-user of Glasforms’ products to document the failure, transmit that information to Glasforms’ customer, and then see that information transmitted to Glasforms, does not render

1 the records inadmissible. There is no reason to believe that the lack of immediate recording
2 diminished the reliability of the records, and Defendants do not argue that the records actually
3 are less reliable as a result of any time lag.

4 **b. Regular course of business**

5 Glasforms intends to offer foundational testimony by its employees with respect to its
6 own record-keeping practices. It also likely will call witnesses from several of its
7 customers—makers of finished rods such as Tyco, Dong Ah, and K-Line—who will testify as to
8 their own record-keeping practices. At least as to records kept in the ordinary course of business
9 by Glasforms or its testifying customers, and that pertain to events as to which Glasforms or its
10 testifying customers had first-hand knowledge, any hearsay likely will be excused by the
11 business records exception. With respect to all other records, however, Glasforms comes up
12 against the well-settled rule that if “the supplier of the information [in the business record] does
13 not act in the regular course [of business], an essential link is broken[,] [since] the assurance of
14 accuracy [that justifies the exception] does not extend to the information.” *See* Fed. R. Evid.
15 803(6), Advisory Committee Note to Paragraph (6); *see also United States v. Arteaga*, 117 F.3d
16 388, 395 (9th Cir. 1997).

17 Glasforms has cited the relevant rule repeatedly, but its citations are conspicuously
18 devoid of any suggestion that it can or will prove that the records provided by primary users of
19 finished rods (i.e., the customers of Glasforms’ customers), or by its own customers who will
20 not be testifying, were kept in the ordinary course of business. *See, e.g.,* Glasforms’ Opp. at
21 6:28-7:2 (stating rule without providing analysis); 8:22-9:5 (again stating rule without
22 identifying proof that third-party records were kept in the ordinary course of business). Thus,
23 while it is true that “[i]f both the source and the recorder of the information, as well as every
24 other participant in the chain producing the record, are acting in the regular course of business,
25 the multiple hearsay is excused,” *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 271 (5th Cir.
26 1991), there appears to be no *evidence* that “every . . . participant in the chain producing the
27 record . . . [was] acting in the regular course of business,” *id.*; *cf.* Supp. Opp., at 3:25-28 (stating
28 that in the instant case, “everyone in the chain of transmission . . . *presumably* were [sic] acting

1 in the regular course of business” (emphasis added)).

2 Glasforms is correct that *United States v. Pazsint*, 703 F.2d 420 (9th Cir. 1983)—the
3 principal case upon which Defendants rely—is unhelpful and easily distinguishable from the
4 instant case. *Pazsint* involved tape-recorded emergency calls to the police that were stored by
5 the police for sixty days. Applying the familiar principles of multiple-hearsay in business
6 records discussed above, the court reached the unremarkable conclusion that because “the
7 witnesses who gave the . . . recorded [information] . . . were under no business duty to report
8 [that information] . . . [,] [their] tape-recorded statements can not [sic] be given the
9 presumption of reliability and regularity accorded a business record.” *Id.* at 425. But
10 Glasforms’ ability to distinguish *Pazsint* does not establish the converse proposition that a court
11 may *presume* that records were kept in the ordinary course of business merely because those
12 records apparently were made by a business. Glasforms cites no authority for this proposition,
13 which would appear to obviate the need for live testimony as to a core element of the business
14 records exception in *all* cases.

15 Because Glasforms apparently cannot provide a business records foundation for each
16 level of hearsay it seeks to introduce, the Court must turn to Glasforms’ argument that the third-
17 party records may be admitted under the more general “incorporated documents” branch of the
18 business records exception, which allows a court to admit items of multiple hearsay that, while
19 lacking their *own* business records foundation, have other indicia of reliability.³

20 **2. “Incorporated records” doctrine**

21 “Rule 803(6) does not require that [a] document actually be prepared by the business
22 entity proffering the document.” *Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338,
23 1343 (Fed. Cir. 1999). Moreover, it is well-settled that “[a]lthough [an entity’s] business
24 records were derived . . . from information provided by outside persons *not under a business*
25 *compulsion*, the business records exception may still apply ‘[i]f the business entity has adequate
26

27 ³ The present discussion of course assumes that Glasforms will be able to establish that its
28 own customer complaint forms were kept in the regular course of business.

1 verification or other assurance of accuracy of the information provided by the outside [entity].”

2 *United States v. Sokolow*, 91 F.3d 396, 403 (3d Cir. 1996) (emphasis added) (quoting *United*
3 *States v. McIntyre*, 997 F.2d 687, 700 (10th Cir. 1993)). There are

4 two factors, indicating reliability, that would allow an incorporated document to
5 be admitted based upon the foundation testimony of a witness with first-hand
6 knowledge of the record keeping procedures of the incorporating business, even
7 though the business did not actually prepare the document. The first factor is that
the incorporating business rely upon the accuracy of the document incorporated
and the second is that there are other circumstances indicating the trustworthiness
of the document.

8 *Air Land Forwarders*, 172 F.3d at 1343.

9 **a. Reliance upon the accuracy of incorporated documents**

10 As evidence of systematic reliance upon the accuracy of records received from its
11 customers or their customers, Glasforms first notes that the International Organization for
12 Standardization (“ISO”) requires that its members investigate thoroughly the cause of failures
13 and identify a documented corrective action. Glasforms argues that as a member of the ISO, it
14 “has a substantial interest in the accuracy of its incorporated customer complaint records[,] . . .
15 [since] [i]f the information were inaccurate, a significant amount of valuable time and resources
16 would . . . be[] wasted in . . . fruitless investigation[s].” Glasforms’ Opp., at 4:17-24.
17 Glasforms also notes that “inflated claims of failures could cause Glasforms to unnecessarily
18 strain its relationship with suppliers and/or accept greater responsibility than it ought.” Opp. at
19 4:28-5:2.

20 Defendants counter that Glasforms’ incentives changed once Glasforms took the position
21 that Defendants should bear responsibility for the subject product failures. Defendants point to
22 an email from Glasforms’ Technical Vice President dated June 29, 2009, which states: “[N]ow
23 we have to figure out how to present [the issue of graphite contamination in CTG glass] to
24 customer’s [sic] & if we can pass liability for this on to CTG.” Defs.’ Reply, at 10 (citing Ex.
25 328, at 6277-78). Defendants note further that by August 26, 2005, Glasforms had sent letters to
26 its customers stating that “[a]fter our exhaustive efforts to determine the cause for these failures,
27 we believe we have found the root cause as trace elements of graphite contaminating the glass
28 fibers as produced by one of our fiberglass suppliers,” and that CTG “was aware of their use of

graphite components in their manufacturing of glass fiber which they represented as suitable for high voltage insulator rods.” Defs.’ Opp. at 10 (citing GLAS0003-4).

While Defendants understandably are concerned that Glasforms developed “motivations to misrepresent,” *Hoffman v. Palmer*, 129 F.2d 976, 991 (2d Cir. 1942), the fact “that records might be self-serving has not been a ground for exclusion,” Fed. R. Evid. 803(6), Advisory Committee Note to Paragraph (6) (citing Laughlin, *Business Records and the Like*, 46 Iowa L. Rev. 276, 285 (1961)). Far more importantly, there are systemic industry-wide interests in accuracy—coupled with potentially severe consequences that would flow from keeping fraudulent or inaccurate records in the face of strict ISO compliance requirements—that allow the Court to conclude with confidence that Glasforms relied sufficiently on the accuracy of the records.

b. Other circumstances indicating trustworthiness

Glasforms argues the following with respect to the general trustworthiness of the third-party records: First, just as Glasforms relies on records from its customers, those customers “depend on their own records . . . and . . . on . . . incorporated records from utility customers . . . to conduct their own affairs.” Supp. Opp., at 5:4-7. In that respect,

both Glasforms’ customers and their utility customers must replace the failed insulator, ensure the safety of their employees, determine if their own conduct caused or contributed to the failure, request compensation where appropriate, and decide from whom to purchase insulators or core rods in the future. In cases where Glasforms’ customers are investigating and documenting failures suffered by their utility customers, they must also protect their valuable relationships with those customers and ensure that they are properly compensated for any problems caused by their suppliers.

Supp. Opp., at 5:7-13.

Specifically with respect to the utility companies that use finished rods manufactured by Glasforms’ customers, Glasforms observes that those companies “may be presumed to have no motive and little opportunity in the regular course of business to falsely reports of infrequent failures of insulators, particularly given the consequences of events like power interruptions, and the inherent risks and complexities in coordinating false reports and falsifying evidence in the face of inevitable inquiry and investigation” Supp. Opp., at 5:15-20.

1 Finally, Glasforms observes that the incorporated records at issue were provided by a
 2 number of independent customers located throughout the world. Glasforms argues that the
 3 general consistency of the reports suggests their reliability and truthfulness, *see Fed. Trade*
 4 *Comm'n v. Figgie Int'l, Inc.*, 994 F.2d 595, 608 (9th Cir. 1993), in that there is no identifiable
 5 motive for these customers to lie, and no reason to believe that the customer reports are “the
 6 product of faulty perception, memory or meaning, the dangers against which the hearsay rule
 7 seeks to guard,” *id.* (citation omitted).

8 The Court agrees with each of the foregoing propositions. Defendants suggest, without
 9 arguing explicitly, that by informing its customers and their customers of certain issues
 10 involving Taishan-manufactured glass, Glasforms tainted these third-parties’ record-keeping
 11 practices and created incentives to provide inaccurate information. But as Glasforms argues, the
 12 countervailing pressures and incentives would have been far too great for the third-parties to
 13 resort to inaccurate or even fraudulent record-keeping practices, as Defendants suggest. Thus,
 14 the Court concludes that both elements of the “incorporated documents” rule have been
 15 satisfied, and that Defendants’ motion must be denied.

16 **3. Rule 807**

17 In the alternative, the subject evidence is admissible under Rule 807. The Rule, which
 18 generally applies “only in exceptional circumstances,” *Ontario Inc. v. Golden State Bancorp,*
 19 *Inc.*, 163 F. Supp. 2d 1111, 1120-21 (N.D. Cal. 2001), provides that

20 [a] statement not specifically covered by Rule 803 or 804 but having equivalent
 21 circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule,
 22 if the court determines that (A) the statement is offered as evidence of a material
 23 fact; (B) the statement is more probative on the point for which it is offered than
 any other evidence which the proponent can procure through reasonable efforts;
 and (C) the general purposes of these rules and the interests of justice will best be
 served by admission of the statement into evidence.

24 Fed. R. Evid. 807.

25 Each requirement of the rule is satisfied in the instant case. First, the statements here are
 26 being offered as evidence of a material fact. Second, they appear to constitute the most
 27 probative evidence that can be procured through reasonable efforts. Forcing Glasforms to obtain
 28 visas and translators in order to bring witnesses from each third-party customer to trial would be

unreasonable and exceedingly impractical.⁴ Moreover, the contemporaneous reports of the third-parties' employees almost certainly are more reliable than any testimony by the employees elicited years after the fact. *See Figgie*, 994 F.2d at 609 (“[T]estimony from the letter-writers is not likely to be any more reliable than the letters themselves.”); *see also Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961) (holding that a contemporary report of a fire in a newspaper article was “more reliable, more trustworthy, [and] more competent evidence than the testimony of a witness called to the stand fifty-eight years later”). Finally, admitting the records “further the federal rules’ paramount goal of making relevant evidence admissible.” *Figgie*, 994 F.2d at 609 (citation omitted). Assuming that the strictures of Rule 803 were interpreted to prevent Glasforms from introducing otherwise reliable evidence, Glasforms would have no way of “proving facts that occurred in remote times and places.” Supp. Opp., at 9:2-4.

For the foregoing reasons, Defendants motion to exclude hearsay evidence will be denied.

B. Glasforms’ motion to exclude testimony regarding the content of evidence destroyed after litigation was anticipated

This motion concerns physical evidence and a series of documents pertaining to Taishan’s production processes during the period in 2004 when it manufactured raw fiberglass ultimately sold to Glasforms. There is no dispute that the following materials and records from that period have been lost, miscategorized, or destroyed: graphite rollers; shift change records; tunnel in/out records; equipment repair records; and equipment maintenance logs. Glasforms argues that Taishan’s destruction of these records violated its duty to preserve evidence in anticipation of litigation. Glasforms seeks an order excluding all testimony and evidence: (1) that the destroyed documents and things contained no relevant information; (2) that there were no incidents of burning due to conductive contamination in Taishan’s RF ovens during the

⁴ In this respect, the vast dispersion of the witnesses and the incredible burden of laying a foundation for a very large number of documents by means of live testimony both constitute “exceptional circumstances” that justify the application of Rule 807.

1 manufacture in 2004 of glass fiber later sold to Glasforms; (3) that Taishan's graphite rollers did
2 not suffer wear that caused them to shed graphite particles during 2004; (4) that the shift change
3 records did not reveal problems during 2004 consistent with defects in and/or contamination of
4 the glass fiber; (5) that the sizing applicator and related equipment cleaning records during 2004
5 did not reveal problems with the sizing consistent with defects in and/or contamination of the
6 glass fiber, (6) that the equipment repair and maintenance logs did not reveal problems with the
7 graphite rollers and gathering shoes during 2004 that could have contaminated the fiberglass at
8 issue, and (7) that Taishan's graphite roller cleaning procedures during 2004 required, and
9 Taishan's practice was, that the graphite rollers were always removed from the manufacturing
10 line and taken to a separate room for any cleaning or other maintenance, instead of being
11 cleaned in place.

12 On July 2, 2009, Judge Seeborg held that Taishan, acting in bad faith or with a mental
13 state tantamount to bad faith—destroyed numerous documents in each of the document categories
14 upon which Glasforms bases the instant motion. *See* Order granting in part and denying in part
15 motion for sanctions (“Sanctions Order”), July 2, 2009, at 11:12-14:7. Consistent with that
16 ruling, the Court has no difficulty concluding that Taishan should not be allowed to present
17 testimony or evidence intended to show that the destroyed documents did or did not contain
18 certain information. Because the records were destroyed improperly, Glasforms has been
19 deprived of any opportunity to rebut Taishan's contentions with respect to the records' contents.
20 Thus, Glasforms' motion will be granted with respect to items (4), (5), & (6). Glasforms'
21 motion also will be granted with respect to item (1), with the proviso that Taishan may attempt
22 to show that the *categories* of documents that were destroyed generally were *less probative* of
23 the issues than those categories of documents that were produced to Glasforms. *See infra*
24 Section A.1.

25 With respect to the remaining items—which seek to preclude *all* testimony or evidence on
26 certain subjects, regardless of whether that testimony or evidence stems from any improperly
27 destroyed documents—the Court must evaluate carefully whether Taishan's actions warrant such
28 a harsh and drastic sanction. Judge Seeborg acknowledged Taishan's argument that it preserved

“other records far more relevant on the issue of defective fiberglass,” but he concluded that irrespective of whether this was true, sanctions were warranted because “Glasforms w[ould] never know the exact relevance of those records as they were destroyed after the anticipated litigation date. . . .” Sanctions Order, at 10:1-4. That conclusion directly supports Judge Seeborg’s decision to require an adverse inference instruction with respect to the destroyed records. In contrast, if Taishan really did provide Glasforms with evidence that was “far more relevant” to the issue of production irregularities, then Glasforms would be entitled to no more than an instruction addressed directly to the evidence that it does *not* possess, rather than to an order precluding all evidence on a given subject, including probative evidence that it *does* possess.

1. Request (2) for order excluding evidence or testimony that there were no incidents in 2004 of contamination-induced burning in Taishan’s RF ovens

As Judge Seeborg’s order explains, every document category in which Taishan destroyed records of its 2004 production processes offered at least the possibility of direct evidence of whether Taishan experienced irregularities in its RF ovens. *See* Sanctions Order, at 4:20-6:2, and 9:15-10:4 (discussing relevance of shift change/shift handover records, tunnel in/out records, equipment repair records, equipment maintenance logs, and documents pertaining to experiments with rubber—as opposed to graphite—rollers). As noted above, Taishan claims that the destroyed evidence simply was less probative than evidence that it did produce to Glasforms. It argues that Glasforms is attempting to use the destruction of less relevant documents as a means of precluding the use of superior evidence that Taishan claims would show the absence of scorching or burning incidents in its ovens. Taishan points to the following classes of purportedly more-relevant evidence that it apparently produced to Glasforms:

– Failed item reports, which are required by the ISO, and which apparently would show any significant abnormal phenomenon in manufactured glass products.⁵

⁵ These documents, dated between 2003 and 2007, purportedly were produced in response to Glasforms’ Request for Production No. 40 in Taishan’s Response to Glasforms Request of Production, Set 4.

1 – Failed item distribution matrix records, which are required by the ISO, and
 2 which apparently identify significant abnormal phenomena in glass manufacturing
 processes.⁶

3 – Scrap notification sheets, which show product damage that resulted from
 4 unusual causes.⁷

5 – ISO-mandated product quality data analysis reports, which apparently document
 6 events that affect the quality of products manufactured in a particular facility, as
 well as any reasons for product damage experienced in a given month, the
 7 quantity of product lost each month, and customer feedback regarding any product
 damage.⁸

8 *See* Zhang Guo Decl., Doc. No. 211, ¶ 5. Taishan appears not to have provided copies of these
 9 materials to the Court, making it somewhat difficult to determine the extent to which the
 10 prejudice to Glasforms has been mitigated by the availability of purportedly more-relevant
 11 documents. Nonetheless, the Court still must craft a narrowly tailored sanction that does no
 12 more than cure the prejudice to the requesting party and deter future misconduct by the violator.
 13 *See, e.g., Gates Rubber Co. v. Bando Chem. Indus.*, 167 F.R.D. 90, 106-07 (D. Colo. 1996). In
 14 that respect, the Court is satisfied that an adverse inference instruction with respect to the
 15 destroyed materials will be adequate. There appear to be extant examples of each category of
 16 destroyed document. Consistent with the Court’s ruling as to item (1), *supra*, the parties may
 17 use that evidence to attempt to persuade the jury that one or the other *type* of evidence is (or
 18 would have been) the most probative of the issues at hand.⁹ An order precluding all evidence on
 19 the issue of whether Taishan experienced production irregularities would “operate in the same
 20 fashion as a default judgment” as to that issue, *Gates Rubber*, 167 F.R.D. at 106, and is
 21 unwarranted under the circumstances.

22 ⁶ These documents, dated between 2004 and 2005, purportedly were produced in response
 23 to Glasforms’ Request for Production No. 41.

24 ⁷ These documents, dated between 2004 and 2007, purportedly were produced in response
 25 to Glasforms’ Request for Production No. 42.

26 ⁸ Documents of this category, dated between 2002 and 2007, purportedly were produced
 27 in response to Glasforms’ Request for Production No. 34.

28 ⁹ Of course, consistent with the Court’s ruling as to Glasforms’ first request, Taishan may
 not claim that the destroyed documents contained *no* relevant information.

2. Request (3) for order excluding evidence or testimony that Taishan's graphite rollers did not suffer wear that caused them to shed graphite particles during 2004

The Court currently is considering whether the record adequately supports an adverse inference instruction with respect to Taishan's present inability to identify graphite rollers that were in service in 2004 on the production line used to make glass sold to Glasforms. That question is a decidedly close one. Yet even if the Court untimely were to overrule Taishan's objections with respect to the rollers, Glasforms' present request would remain vastly overbroad, in that it might well pre-determine the outcome of the entire trial. Such a result would lack any proportionate relationship with the loss of some unspecified number of graphite rollers.

First, Glasforms is in possession of a sample of one of the rollers it claims was destroyed improperly. Second, it was never Taishan's practice to sort, catalog, or otherwise track the rollers, which have no identifying marks, and which were and are rotated on and off the production line as needed. Third, even though, at the time it removed two rollers from the production line, Taishan already had identified graphite as the likely cause of contamination in its internal report, it is difficult to see why it would attach any particular importance to any individual roller or set of rollers from that period. It is undisputed that Taishan could not have determined precisely which rollers were used to produce glass for Glasforms. Well before Taishan reasonably could have anticipated litigation, it removed several rollers from its production line because they "might be useful." Zhang Depo. I, at 662:20-23. Those rollers apparently were several of numerous rollers available that might have been equally likely—or unlikely—to have been in use at the time the subject glass was made, and that might have helped Taishan determine if its rollers were responsible for any contamination. Neither the fact that those *specific* rollers—which had no special significance—were lost at some unknown time, nor the fact that none of the concededly fungible rollers, *in general*, could be tracked at the time litigation became reasonably probable, gives rise to an inference of culpable conduct that would support the drastic and extraordinary relief sought by Glasforms.

3. Request (7) for order excluding evidence or testimony that Taishan's graphite roller cleaning procedures during 2004 required, and Taishan's practice was, that the graphite rollers always be removed from the manufacturing line and taken to a separate room for any cleaning or other maintenance, instead of being cleaned in place

As the basis of its request to exclude all testimony or evidence of Taishan's cleaning procedures in 2004, Glasforms essentially points to (1) the existence of written procedures from 2007, and (2) Taishan's failure to produce any such written procedure or policy from 2004. Glasforms' request is far too broad. While Taishan's failure to produce a written policy with respect to the cleaning of rollers in 2004 clearly prevents it from arguing that such a policy existed or tended to show certain facts, the lack of an extant written policy does not warrant the exclusion of other evidence or testimony of 2004 cleaning procedures that might be available. Glasforms' request to exclude, in limine, the written evidence of the 2007 procedures also will be denied. While it would appear to be unlikely that Defendants will be able to lay an adequate foundation for the 2007 policy, they will have the opportunity to attempt to do so.

C. Defendants' motion to exclude evidence that is the product of Glasforms' destructive testing, and that Glasforms has now destroyed

Defendants move to exclude all evidence that is the result of destructive testing of insulator rods by third-party laboratories retained by Glasforms. Defendants claim that Glasforms' undisclosed decision to order destructive testing of failed rods after litigation reasonably was anticipated—and in many cases after the filing of the instant action—is sanctionable. The Court carefully has considered the record and the parties' arguments, and while it agrees with Defendants that Glasforms committed serious violations of its duty to preserve evidence, it concludes that wholesale exclusion of the subject evidence is unwarranted because the evidence itself is neither unreliable nor unambiguously favorable to Glasforms, and because Defendants have not made a convincing showing of prejudice. However, the Court also concludes that Glasforms' conduct warrants a jury instruction indicating, in essence, that Taishan was not the only party to fail in its duty to preserve evidence, and that Defendants were

prevented from performing further tests on the samples that were destroyed.

1. Background

Even before this litigation began, Glasforms made available to Defendants a not-significant amount of material—both raw fiberglass and samples of failed rods—for inspection and testing. *See* Order denying motion to compel and for sanctions (“Sanctions Order I”), October 29, 2008, at 5:6-6:1. Initially, in connection with a preliminary investigation in November 2004 into the cause of the rod failures, Glasforms sent several burned samples to Taishan for review and analysis. *See* Little Depo, Dunn Decl.,¹⁰ Ex. D, at 102:2-103:14; Peng Depo, Dunn Decl., Ex. C, at 113:23-114:3. Then, in connection with a January 2005 visit by CTG officials to Glasforms’ Birmingham, Alabama, plant, Glasforms provided additional burned rods for testing and analysis by Taishan. Peng Depo, Dunn Decl., Ex. C, at 100:2-21, 102:6-14. After litigation had commenced, Glasforms opened its plants for inspection by Defendants. The first inspection occurred on September 7, 2006 at Glasforms’ San Jose, California, facility. White Decl., ¶ 8. At this inspection, Glasforms made available to Defendants samples of raw fiberglass, samples of failed insulators, and samples of failed insulator core rods. White Decl., ¶ 8. A second inspection occurred on January 23, 2007 at Glasforms’ Birmingham plant. White Decl., ¶ 9. After the inspection, Glasforms provided the following materials to Defendants: fiberglass samples from all three suppliers used by Glasforms between 2004 and 2006, quarantined raw Taishan fiberglass from 2004, customer-returned insulator core rods containing Taishan glass that had been diagnosed by Glasforms as having a high electrical current leakage, and failed insulators. White Decl., ¶ 8, 9; Dunn Decl., Doc. no. 160, ¶¶ 15, 31-33, Exs. C, J-L. Also available for inspection was a collection of insulators stored by Dong Ah in a Korean warehouse for potential use in this litigation. Dunn Decl., ¶ 4.

On August 27, 2008, Defendants requested that Glasforms produce all physical samples of failed products held in its possession. The request came approximately four years after

¹⁰ Unless otherwise noted, reference to the Dunn Declaration in the context of the instant motion refers to Docket No. 304.

1 receiving the first samples of failed insulator core rods, two years after the first inspection of
2 Glasforms' facilities, eighteen months after the second inspection, and two days before the fact
3 discovery cut-off. To justify the apparent lateness of their request, Defendants pointed out that
4 it was not until mid-January 2008, days before they were to take depositions at Glasforms'
5 Birmingham plant, that Glasforms provided any more than vague suggestions regarding
6 apparent failures of rods made with glass from suppliers other than CTG/Taishan. When
7 Glasforms declined to produce the materials, Defendants filed a motion to compel and for
8 sanctions.¹¹ Judge Seeborg denied the motion, concluding that Glasforms had complied fully
9 with all of Defendants' earlier discovery requests, and that their further request for physical
10 evidence was "simply too late." Sanctions Order I, at 5:19-21.

11 Judge Seeborg was not called upon to address whether Glasforms had complied with its
12 duty to preserve relevant evidence. In that respect, there appears to be no dispute that Glasforms
13 ordered destructive tests on a large but indeterminate number of failed insulator rod samples. In
14 some instances, the testing revealed what Glasforms considers to be critically important
15 evidence of graphite contamination. *See, e.g.,* Sellers Decl., Ex. B-328, at 6277-78 (expressing
16 satisfaction at having found a "smoking gun" in the form of graphite identified on a sample of
17 CTG glass "from production date 10/10/04"). Yet, the destructive testing occurred without
18 notice to Defendants, and although Glasforms claims to have preserved some remnants of the
19 tested samples as well as portions of the failed insulators themselves, the portions on which
20 graphite allegedly was found appear to have been destroyed.

21 **2. Discussion**

22 The Court begins by noting its disagreement with several premises underlying
23 Glasforms' opposition to the instant motion. First, Glasforms' implied assertion that it did not
24 reasonably anticipate litigation until December 2005, on the eve of the filing of the instant
25 lawsuit, is simply not credible. An email dated June 29, 2005 and written by Glasforms'

26
27 ¹¹ The "sanction" requested was an order requiring Glasforms to disclose exactly what
28 materials it had and what materials, if any, had been destroyed.

1 Technical Vice President states, with respect to an analytic testing report:

2 Hugh Gotts [of Balazs laboratories] found the ‘smoking gun’! He found graphite
3 on the CTG glass, from production date 10/10/04 . . . Eureka!! . . . now we have to
4 figure out how to present this to customer’s [sic] & if we can pass liability for this
5 on to CTG.

6 Sellers Decl., Ex. B-328, at 6277-78. The content of this message speaks for itself. In addition,
7 Glasforms has identified no justification for assigning it a later preservation date than that
8 assigned to Defendants.

9 Second, the Court rejects Glasforms’ argument that only insulator rods made with
10 Taishan-manufactured glass had any inherent relevance. Glasforms argues that because a
11 greater percentage of failures occurred in rods made with Taishan glass than in rods made with
12 other manufacturers’ glass, all other failures are irrelevant. Yet, while Glasforms considers
13 Defendants’ contrary argument to be “neither intuitively correct nor . . . logical,” Glasforms’
14 Opp., at 12:27, it is Glasforms’ argument which deserves that label. Indeed, because this case
15 involves the failure of products made using multiple components and a complex manufacturing
16 process, it is at least quite plausible that the process, rather than a component input such as raw
17 fiberglass, was the cause of the problems. Whether that was true here was not a determination
18 for Glasforms to make in the context of its obligations to preserve evidence.¹² See *Leon v. IDX*
19 *Systems Corp.*, 464 F.3d 951, 956-57 (9th Cir. 2006) (affirming imposition of sanctions and
20 noting district court’s determination that “[Plaintiff] did not have authority to make unilateral
21 decisions about what evidence was relevant in this case”). Contrary to Glasforms’ suggestions,
22 all of the insulator rod failures that Taishan has identified were at least potentially relevant to the
23 instant litigation.¹³

24 ¹² With respect to the separate issue of whether Glasforms produced evidence that was
25 responsive to Defendants’ discovery requests, the Court agrees with Judge Seeborg’s assessment
26 that Glasforms did so, particularly given the fact that Defendants framed their requests in terms
27 of the allegations made by Glasforms, which lacked any reference to failures involving non-
28 Taishan glass.

¹³ Even assuming that Glasforms’ decision to order destructive testing on certain samples
without notifying Defendants could be excused on the ground that Glasforms preserved all
samples that remained of the failed rods, Glasforms has not presented clear evidence that it

1 Third, irrespective of whether samples of failed insulators made with glass from
 2 suppliers other than Taishan were relevant, there is no dispute that samples of failed rods made
 3 with Taishan-manufactured glass would be highly relevant and critically important evidence.
 4 Glasforms' decision to conduct destructive testing on these materials was a flagrant violation of
 5 its duties as a litigant. Indeed, even if a party "*cannot* fulfill [its] duty to preserve [evidence] . . .
 6 , [it] still has an obligation to give the opposing party *notice* of access to the evidence or of the
 7 *possible* destruction of the evidence if the party anticipates litigation involving that evidence."
 8 *Silvestri v. General Motors Corp.* 271 F.3d 583, 591 (4th Cir. 2001) (emphasis added); *see also*
 9 *Graff v. Baja Marine Corp.*, 310 Fed. Appx. 298, 301 (11th Cir. 2009) (unpublished) (affirming
 10 exclusion of testing evidence where "an individual acting at [the] direction [of plaintiffs'
 11 metallurgist] conducted destructive tensile tests on a portion of [a boat's] gimbal housing
 12 without notifying the manufacturers"). Nor does it matter that the tests were destructive of only
 13 a portion of the failed rods. *See 103 Investors I, L.P. v. Square D Co.*, 470 F.3d 985, 988 (10th
 14 Cir. 2006) (affirming exclusion of testimony based on physical evidence where, "without notice
 15 to the defendant, plaintiff threw away fifty to sixty feet of the busway and saved only four feet,"
 16 which portion did not contain the critical evidence). As already noted, key evidence appears to
 17 have been generated from the portions that no longer exist.¹⁴

18 Notwithstanding the serious nature of Glasforms' destruction of relevant or potentially
 19 relevant evidence, there are multiple factors that counsel against exclusion of the test results or
 20

21 retained intact samples or post-testing remains of failed insulator rods. Glasforms relies
 22 principally on the declaration of Barry White to establish that it did not knowingly destroy any
 23 evidence. But the White declaration states merely that "Glasforms . . . retained *numerous*
 24 samples returned burned rods containing CTG glass," that it "retrieved and kept remnants of
 25 *some* independently tested samples," and that it "has retained most, but not all, samples of failed
 26 insulators made from other suppliers' fiberglass on an 'as needed' basis for its ongoing
 investigations of those failures." White Decl., ¶¶ 5-6 (emphasis added). This imprecise
 explanation of Glasforms' approach to the preservation of evidence is insufficient.

27 ¹⁴ Glasforms has identified one instance of unannounced destructive testing of rod
 28 samples by Defendants, *see* Guo Depo., Dunn Decl., ¶ 7, Ex. E, at 352:17-19, but there is no
 evidence that such testing was anywhere as systematic as that engaged in by Glasforms.

1 of testimony based on those results. First, it is beyond reasonable dispute that the test results,
 2 which were generated by independent and reputed laboratories, are legitimate and potentially
 3 highly probative evidence of what caused the failures at issue. While Defendants complain that
 4 they lacked an opportunity to participate in or replicate the testing performed on the subject rod
 5 samples, Glasforms itself did not participate in the tests. The testing was conducted primarily
 6 by Air Liquide's Balazs Analytical Services, a well-known independent laboratory. Defendants'
 7 own expert, Dr. Viktor Hadjiev, testified that he would not have considered it helpful to run
 8 additional tests on the materials tested by Balazs

9 because the whole information that I need was within these reports. . . . I'm
 10 familiar with the particular spectroscopic instruments both companies use to
 11 produce these reports. Balazs is using [a] Renishaw spectrometer, and I work
 12 with Renishaw equipment in Max-Planck Institute and also Rice University here.
 13 So I'm quite familiar with the particular models of Renishaw instruments that
 Balazs used. . . . And I'll say it again, because I know very well these two
 instruments, I know very well what might be in most cases the reason of some
 artifacts during the measurements, so I didn't . . . need at that time to do additional
 measurements on the sample.

14 Hadjiev Depo, Dunn Decl., ¶ 19, Ex. Q, at 81:15-84:23. Defendants also were given the
 15 opportunity to depose representatives of the independent laboratories that conducted the
 16 analysis, and they did so in the case of Balazs.¹⁵

17 More importantly, while Defendants could not be expected to know precisely what
 18 would have been revealed by additional tests, there is little indication that Defendants would
 19 have conducted any additional testing. Rather than request additional samples for testing,
 20 Defendants provided to their experts the samples that had been produced by Glasforms, and
 21 requested that the experts perform various forms of analysis. *See, e.g.,* Dunn Decl., Exs. P, U;
 22 *see also* Gorur Depo, Dunn Decl., Ex. R at 35:19-38:5 & 213:1-4; Karady Depo, Dunn Decl.,
 23
 24
 25

26 ¹⁵ Nor do the test results appear unambiguously, or even clearly, to favor Glasforms'
 27 position. *See* Defs.' Mot. for Sanctions, at 6 n.2 (arguing, based on expert report, that results of
 28 Raman analysis suggest presence of "disordered carbon" as opposed to far more conductive
 graphite).

Ex. M, at 197:9-24.¹⁶ Defendants also did not inspect or seek testing of the insulators stored in Dong Ah's Korean warehouse. Dunn Decl., ¶ 4. Similarly, and even more importantly, it was not until *after* oral argument on the instant motion that Defendants even suggested that there were other available tests that might have produced results better or even different from those produced by the tests ordered by Glasforms. Even now, Defendants have provided no more than a list of "additional tests that could have been done," without explaining the particular capabilities of those tests. In that respect, the Court again emphasizes that while Defendants cannot be faulted for their ignorance of the *specific facts* that any further tests might have revealed, *cf. Marrocco v. General Motors Corp.*, 966 F.2d 220, 223 (7th Cir. 1992) (finding it "ironic that the plaintiffs also contend that [the defendant] has not adequately explained what an intact bearing assembly would have shown, [since] it was the plaintiffs' own misconduct which prevented [the defendant] from acquiring that very information"), it is entirely reasonable to require that Defendants explain whether any tests they might have conducted *could* have produced results better or different from the independently derived results that *are* available. The requirement of such a showing is particularly justified here, where it appears that Defendants demonstrated little interest in conducting root-cause testing on the samples made available to them. *See supra*.

"While a district court has broad discretion in choosing an appropriate sanction for spoliation, 'the applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine.'" *Silvestri*, 271 F.3d at 590 (citing *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2nd Cir. 1999)). Here, the Court faces a situation in which (1) Glasforms clearly breached its duty to preserve evidence, but (2) Defendants have made a weak showing of actual—as opposed to hypothetical—prejudice, and (3) at issue are large quantities of independently derived testing data that may constitute the best scientific evidence available. To address this situation, the jury will be instructed that

¹⁶ In light of Defendants failure to test the materials, it is perhaps not surprising that in requesting the additional materials from Glasforms at the close of discovery, Defendants did not provide any explanation of their purported need for the materials. *See* Dunn Decl., Exs. J-K.

1 Glasforms, in violation of its duties as a litigant, ordered sometimes-destructive testing of
2 samples of failed insulator rods without notifying Defendants. The jury will be instructed
3 further that it is not required to draw any adverse conclusions as to the validity of the test results
4 that were generated, since the tests were conducted by independent laboratories. However, the
5 jury will be told that as a result of Glasforms' conduct, Defendants were unable to perform their
6 own tests on the destroyed samples.

7 Beyond these instructions, there will be no further reference to the legal propriety of the
8 destructive tests, except by the parties in closing argument, if they so choose. The parties may
9 elicit testimony on the subject of the relative strengths and weaknesses of the tests that *were*
10 performed viz-à-viz those that could not be performed. Similarly, Defendants may elicit
11 testimony as to whether the Raman or other tests ordered by Glasforms were sufficiently likely
12 to identify failure causes other than graphite—causes such as dry glass, voids, or the presence of
13 thermocouple wire. Finally, Glasforms may elicit testimony on the subject of whether or not
14 Defendants *did* perform any such testing on samples that were provided to them.¹⁷ The parties
15 are directed to submit proposed instructions to the Court not later than August 10, 2009 at 5 PM
16 PDT.

17 **D. Defendants' motion to exclude testimony of previously undisclosed witnesses**

18 Defendants move to exclude the testimony of Tony Carreira, Dr. Zi Li, Todd Jones, and
19 John Menzel. As the Court stated at the pretrial conference held on June 26, 2009, the
20 testimony of Todd Jones and John Menzel will be permitted in rebuttal only. With respect to
21 Dr. Li and Tony Carreira, it is apparent that Defendants' objection is aimed less at these
22 witnesses' testimony than at an experiment to which their testimony would refer. The
23 experiment, in which an insulator rod was "salted" with graphite, was conducted after all initial
24 and rebuttal expert reports had been exchanged. The experiment was disclosed to Defendants in
25 materials they received in advance of their deposition of Glasforms expert Dr. John Moalli, and
26

27 ¹⁷ These categories of testimony and evidence are merely illustrative. As with all of the
28 Court's present conclusions, the scope of permissible testimony and evidence is subject to
revision at trial.

1 Defendants did not question Dr. Moalli about the experiment. However, the Court agrees that
2 Defendants were under no obligation to do so since the experiment was not timely disclosed.
3 For that reason, the experiment is inadmissible and Dr. Li's and Mr. Carreira's foundational
4 testimony with respect to the experiment will be excluded.

5
6 **IT IS SO ORDERED.**

7
8 DATED: 7/30/09

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11 JEREMY FOGEL
12 United States District Judge
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1 This Order has been served electronically upon the following persons:

2 April E. Sellers april.sellers@bakerd.com

3 David K. Herzog david.herzog@bakerd.com

4 Eugene Ashley eashley@hopkinscarley.com, ihernandez@hopkinscarely.com,
5 ihernandez@hopkinscarley.com, jdooley@hopkinscarley.com

6 Jennifer M. Phelps jennifer.phelps@bakerd.com, debora.schmid@bakerd.com

7 Kevin M. Toner kevin.toner@bakerd.com, judy.ferber@bakerd.com

8 Lisa J. Cummins lcummins@campbellwarburton.com

9 Noelle Dunn gcordova@hopkinscarley.com, ndunn@hopkinscarley.com

10 Robert A. Christopher rchristopher@hopkinscarley.com, ihernandez@hopkinscarley.com

11 Sophie N. Froelich sfroelich@nossaman.com, ntorpey@nossaman.com

12 Tod C. Gurney tgurney@hopkinscarley.com

13 Notice has been delivered by other means to:

14 Glasforms Inc.,
15 William Whitcom Faulkner
16 McManis, Faulkner & Morgan
17 50 West San Fernando St., Suite 1000
18 San Jose, CA 95113
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21
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